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[APPELLATE CIVIL JURISDICTION]
BUCKNILL, C.J., EBDEN & EDMONDS, JJ.
November 30, 1915.

N. S. NARAINAN PILLAY..... Plaintiff (Respondent)

vs.

THE NETHERLANDSCHE HANDEL MAATSCHAPPIJ } Defendants (Appellants)

[SINGAPORE SUIT No. 543 of 1913]

Mortgage—Sale by mortgagee to nominee or agent—Specific performance at suit of purchaser—Evidence—Whether oral evidence admissible to show that party to a contract in writing acted as a nominee or agent—Evidence Ordinance 1893, section 92.

A bank holding a mortgage over certain property and proposing to exercise its power of sale as mortgagee entered into an oral arrangement with A whereby A was to buy the mortgaged property at the sale thereof by public auction as the nominee or agent of the mortgagee, in the event of a satisfactory price not being reached at the auction. The property was duly put up for sale and was knocked down to A at the price of $134,000, and A paid the deposit by a cheque drawn on an overdraft account with the bank. A memorandum of the contract of sale was signed by A and by the auctioneers as agents of the mortgagee, in which the property was stated to have been sold by the mortgagee to A and there was no reference to the oral arrangement. The parties proceeded with the conveyance of the property up to a certain point but completion was then delayed and A died before obtaining a conveyance. The bank thereafter refused to proceed with the conveyance on the ground that A had merely acted as their nominee or agent in purchasing the property. In an action by A's executor against the bank for specific performance of the contract of sale.

Held, by the Court of Appeal (Bucknill, C.J., Ebden and Edmonds, JJ.), that oral evidence was admissible to show that A entered into the contract as the nominee or agent of the bank. Indian decisions on the corresponding section in the Indian Evidence Act to section 92 of the Evidence Ordinance, 1893, do not necessarily apply in this Colony, where statutes such as the Indian Contract Act and the Indian Specific Relief Act, which confer certain definite equitable powers on the Court, have no application.

Quaere, by Edmonds, J., whether in this Colony, where rules of English common law and equity apply, section 92 of the Evidence Ordinance, 1893, should be construed any differently to the rule in England as to the exclusion of oral evidence in the case of a contract in writing.

Held further, (by Bucknill, C.J., and Edmonds, J., Ebden, J., dissenting) reversing the judgment of Earnshaw, J., in the Court below, that the oral evidence established that A acted in the purchase merely as a nominee or agent of the mortgagee and that the sale to him was consequently void. *Per* Ebden, J. The contract is clear *prima facie* evidence of a genuine sale and the parties had by their subsequent conduct adopted the sale as genuine.

This was an action brought by the Plaintiff, as executor of Navena Cheyna Chellappa Pillay, deceased, claiming specific performance of an Agreement in writing dated the 12th January, 1911, for the sale of certain immoveable property by the Defendants to the said Chellappa Pillay, deceased, for $134,000.

Chellappa Pillay was a money-lender and the Defendants were a Bank. The Defendants' local manager was a close business associate of Chellappa Pillay who was a customer of the Defendants. The Defendants were sub-mortgagees of certain immoveable property and proposed exercising their power of sale by putting the property up for sale by public auction. Before doing so the Defendants' local manager entered into a verbal arrangement with Chellappa Pillay whereby the latter, in the event of a satisfactory price not being reached at the auction, was to buy the property as a nominee or agent on behalf of the Defendants. The mortgaged property was put up for sale on the 12th January, 1911, and was knocked down to Chellappa Pillay at the price of $134,000. He paid the stipulated deposit of $33,500 by a cheque drawn on a special overdraft account with the Defendants started for the purposes of the transaction and on which the Defendants charged him interest. A memorandum in writing of the contract of sale in the usual form was signed by Chellappa Pillay and by the auctioneers as agents for the Defendants. Thereafter Chellappa Pillay gave instructions to his solicitors to prepare a conveyance of the property and the draft conveyance was approved by the Defendants' solicitors, but completion thereof was held up in consequence of an action which a third party had commenced against the Defendants to set aside the mortgage under which the Defendants purported to sell. Subsequently Chellappa Pillay went to India and died there in May, 1912. The Plaintiff as executor of Chellappa Pillay applied to the Defendants for completion of the conveyance but they declined to proceed with the matter, and this action was brought.

The Defendants pleaded that the sale was void by reason of the arrangement above referred to whereby Chellappa Pillay merely acted as their nominee or agent in purchasing the property, and they sought to adduce oral evidence in support of this plea.

The Plaintiff opposed the admission of such oral evidence on the ground that such evidence was excluded by section 92 of the Evidence Ordinance, 1893, and also pleaded that such evidence coupled with other evidence as to the intention of the parties did not bear out the Defendants' allegation that the sale was not a genuine one.

The action was tried on the 8th and 9th days of December, 1914, before Earnshaw, J., who rejected the evidence of the arrangement whereby the Plaintiff was to act as the Defendants' nominee or agent in the matter, as inadmissible under section 92 of the Evidence Ordinance, 1893; he also held that to admit such evidence would be to allow the Defendants to give evidence of matter shewing their own fraud; he accordingly gave judgment for the Plaintiff.

The Defendants appealed and their appeal came on for hearing on the 3rd, 4th, 5th, 6th, 9th and 10th days of August, 1915, before Sir John Bucknill, C.J., and Ebden and Edmonds, JJ.

Knowles & F. G. Stevens for the Defendants (Appellants).

Sir Evelyn Ellis & Roland Braddell for the Plaintiff (Respondent).

Cur. Ad. Vult.

The Court of Appeal delivered the following written judgments on the 30th November, 1915:—

BUCKNILL, C.J.—The plaintiff in this case is one of the executors of a certain Navena Cheyna Chellappa Pillay (to whom it will be convenient to refer hereafter as Chellappa) and he claimed specific performance of an agreement in writing dated the 12th of January, 1911, and made between Chellappa and the defendants.

This agreement reads thus:—

CONTRACT.

"Memorandum at the sale by Auction this 12th day of January, 1911, of the property comprised in the foregoing particulars Chellappa Chitty of 82 Market Street was the highest bidder for and was declared the purchaser of Lots 1, 2 and 3 of the said property at the price of dollars one hundred and thirty four thousand and the said Chellappa Chitty has paid to Messrs. H. L. Coghlan & Co., as agents for and on behalf of the vendors the sum of dollars thirty three thousand five hundred by way of deposit and agrees to pay the balance of the purchase money and complete the purchase according to the above conditions and the said Messrs. H. L. Coghlan & Co., as the vendors' agents hereby confirm the said sale and acknowledge the receipt of the said deposit.

Purchase money	..	$134,000.00
Deposit paid	..	33,500.00
Balance	..	$100,500.00

Sd. N. C. Chellappa Pillay (in Tamil)
Sd. H. L. Coghlan & Co.
Agents for the vendors."

The defendants, who are admittedly the vendors referred to in this agreement, sought to adduce oral evidence to show that at the auction sale Chellappa merely acted as their agent.

In reply the plaintiff contends that such evidence is not admisable and that even if it were admissible if coupled with other evidence as to the intention of the parties, does not prove the defendants' allegation.

The first question therefore for consideration is whether this evidence is admissible.

The plaintiff firstly contends that oral evidence is here only admissible if it falls within the purview of section 92 of the Evidence Ordinance, 1893.

This section, so far as it is material, reads as follows:—

"When the terms of any such contract grant or other disposition of property or any matter required by law to be reduced to the form of a document have been proved according to the last section no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting varying adding to or substracting from its terms:

Proviso 1.

"Any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud intimidation illegality want of due execution want of capacity in any contracting party the fact that it is wrongly dated want or failure of consideration or mistake in fact or law.

Proviso 2.

"The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms may be proved. In considering whether or not this proviso applies the Court shall have regard to the degree of formality of the document."

There are other provisos but it is unnecessary here to refer to them.

Now in order to ascertain whether oral evidence is admissible under this section it is necessary to consider shortly what would be the legal status of this agreement if it is true that Chellappa acted merely as the defendants' agent. There is no doubt that it would have no legal status at all or in other words that it would simply be a mere nullity. I am doubtful if section 92 was framed with any idea of covering such a case as this although did I think it necessary to deal with the question solely on this ground I should have felt inclined to decide that

the oral evidence could be admitted under the first proviso.

Now it is strongly urged on behalf of the plaintiff that this Court has no power to admit oral evidence bearing upon a written agreement, unless the admissibility of such evidence clearly falls within the terms of the Ordinance and this argument is based upon numerous Indian decisions in which this principle appears to have been laid down broadly with regard to the Indian Courts.

It is desirable however to point out that in India the Court there possesses equitable powers granted by the Legislature which probably confer all such equitable jurisdiction as has been found to be there necessary. Such legislative authority is not however necessary in this Colony where the Court from its inception has been endowed with all the equitable jurisdiction exercised by a Court of Equity in England and for this reason it does not appear that here the Evidence Ordinance of 1893 can be so construed as to oust the general powers possessed by this Court.

Under such it would obviously be normally impossible for this court to give effect to an agreement which was proved to be no agreement.

The plaintiff however argues that even if the court has such equitable power it should not in this case be exercised because in entering into this agreement with Chellappa, the defendants had a fraudulent intention against a third party. It is necessary therefore to see whether firstly there was in fact any such fraudulent intention and secondly whether if there was it would justify the court in refusing to allow the defendants to adduce the evidence which they wish to adduce.

Now the account given by a Mr. Houtsma who was the defendants' agent in Singapore of the position is that in 1910 the bank had obtained a sub-mortgage of certain property from one S. N. A. Jayamkondam Chitty to secure a sum of $235,000; that the bank wished to realise its security and proposed to sell it by auction; that it was arranged with Chellappa that if the property did not call forth a suitable bid Chellappa should buy the property on behalf of the bank; and that so far as S.N.A. was concerned it was desired to make him (S.N.A.) think that the sale was a genuine one to Chellappa; Houtsma admits that S.N.A. was in fact not told that the sale was not a genuine one until after the bank had settled up all outstanding disputes between themselves and S.N.A. How far, if at all, the belief engendered in the mind of S.N.A. that the sale was a genuine one affected the terms of settlement is not brought out clearly.

It does not appear necessary to form any conclusion as to whether this proceeding should properly have been designated fraudulent or merely deceptive as such a question does not seem material, for, if Chellappa agreed with Houtsma to act as the bank's agent at the sale and whether or not he was aware of Houtsma's ulterior design against S.N.A., it is difficult to see how as between Houtsma and Chellappa such ulterior design could be utilised as helping Chellappa to obtain a beneficial title to a property to which he had no vestige of such a claim. The evidence therefore appears to be admissible and there remains only now therefore the question whether such evidence proves the defendants' allegations.

This evidence consisted firstly of that of Mr. Millard who is a partner in the well known firm of solicitors Messrs. Donaldson & Burkinshaw. He says, *inter alia:*

> "In or about November or December, 1910, the agent of the defendant bank Mr. Houtsma consulted me about the mortgage and as to what steps he could take to recover the moneys secured by it. .....Mr. Houstma then said that the defendant bank would buy the property either themselves or through an agent. I advised Mr. Houtsma that a mortgagee could not buy the property sold by him and that any such purchase either in the mortgagee's own name or in the name of an agent or a nominee would be voidable. .....Mr. Houtsma was annoyed..... He insisted that there was no harm in the course he suggested.....and he decided to carry out his intention. He instructed me to prepare conditions of sale which was done and the sale was arranged for the 12th January, 1911. Shortly before the sale Mr. Houtsma came to see me and brought N. C. Chellappa Pillay with him. He told me that he had arranged with Chellappa that Chellappa should go to the sale and buy the property on behalf of the bank subject to a satisfactory price not being reached at the sale. He told me that his bank and Chellappa Chitty had had business transactions for a long time and were on terms of business friendship. Chellappa fully understood the position and that he was to bid as agent of the bank.....Chellappa arranged with Mr. Houtsma in my presence that if he was the highest bidder he would take a conveyance of the property and act according to the instructions of the bank with regard to the management and realisation of the

property. There was nothing to show that he held the property for the bank but it was mooted that a mortgage should be given to the bank: that was however left to a later meeting.....I still objected to the course Mr. Houtsma suggested in so much that I suggested that it would be necessary for my firm to write to him and point out the difficulties that might arise in order to put on record what my advice was. Mr. Houtsma agreed to this.....I went home on 22nd March, 1911. I spoke to Mr. C. I. Carver about this business before I left. I did not write any letter to the bank as I said I would do owing to pressure of business but I arranged with Mr. C. I. Carver to write such a letter and I subsequently found out that Mr. Carver did so on 16th May, 1911. I wrote to Mr. Carver on the way home or after my arrival to remind him to write that letter."

The letter of Mr. C. I. Carver (who is also a partner in Messrs. Donaldson & Burkinshaw) referred to by Mr. Millard is so important that it is desirable to set it out at length.

"Singapore, 16th May, 1911.

Dear Mr. Houtsma,

S. N. A. Jayamkondam Chitty.

"With reference to this matter and to the interviews you have had with Mr. Millard thereon before he left, the position which it is desired to be put before you is as follows:—

"The property comprised in the mortgage of 1st April, 1910, was put up for sale by auction and was purchased by R. C. Chellappa Pillay, who in fact is acting as your agent at the price of $134,000. The conveyance is now being made out in his favour and you have instructed us to prepare a mortgage from Chellappa Pillay to the Society of the property for the same amount.

"The sale by the Society as mortgagee to another person as your agent is voidable and further if no steps are taken to upset it there is the risk of Chellappa Pillay dying in which case his representatives may claim the property subject to your mortgage whereas your intention is that Chellappa Pillay should sell the properties comprised in the mortgage from time to time paying over to you the whole proceeds.

"The transaction therefore is one which as Mr. Millard advised is not legal and I am writing this letter so that if any question subsequently arises upon these transactions when you and your present staff may have left Singapore that we wrongly advised the Society on the subject.

"The title of Jayamkondam Chitty himself is as was pointed out not good as the mortgage to him was made by an executor more than 6 years after his testator's death but as you could get no further or better security it was accepted.

Yours sincerely,
(Sd.) C. I. Carver."

"G. J. Houtsma, Esq."

It is necessary to give great consideration to Mr. Millard's evidence; he is a gentleman of well known integrity and it would seem that there is no reason for doubting that the account which he gives as to what took place must be regarded as true.

Next is the evidence of Houtsma and although his conduct may not have been such as to entitle his evidence to be regarded with the same confidence as that of Mr. Millard yet it cannot be altogether disregarded.

He says, *inter alia:*

"I have heard Mr. Millard's evidence. This is correct. I objected to a sale at an amount much less than claim. I told Mr. Millard that I was going to buy this through an agent. Before the date of the proposed sale I took Chellappa Pillay to Messrs. Donaldson & Burkinshaw's office. That was in December, 1910, or January, 1911. I knew Chellappa Pillay well..... I arranged with him that he should purchase the property as agent of the bank, if it did not go for a price at which I was willing to sell. That price was in the neighbourhood of $190,000—$200,000. This matter was discussed between me and Millard and Chellappa Pillay. The latter understood the position. Myself and Mr. Groskamp attended the sale on behalf of the bank. Mr. Groskamp came to our office with Chellappa Pillay. Mr. Millard was also in our office. Mr. Groskamp came and told me that the highest offer was $133,000. I did not want to sell at that price. I, therefore, instructed Chellappa Pillay to offer $134,000 on our behalf for it. There was no idea of Chellappa Pillay buying that property on his own account. The deposit of $33,500 was paid by a cheque drawn by Chellappa Pillay on our bank, and debited to a special account. This is the cheque .....Chellappa Pillay had already an account in the bank. This cheque was not debited to that, but to a No. 2 account. It

was never intended that Chellappa Pillay should pay that account. He never did pay anything to that account. No credit was ever in that account. That account was closed. Chellappa Pillay never paid a penny towards that $33,500 in any shape or form. In May, 1911, Mr. C. I. Carver wrote to me in reference to this sale..... The property in question is in the possession of the defendants.....There was subsequently litigation between the defendants and S.N.A. That litigation was settled by agreement dated 11th April, 1913. Chellapa during his lifetime never made any claim at all in connection with the property.....Our object was to cut out the first mortgagee, but we did want him to think there was a genuine sale. We wanted to find out the value. There was not enough notice given of the sale to make the auction valuable in that respect. There was no valuation made by a surveyor. Another object was to get rid of all the litigation with the partner in S.N.A. those being our mortgagors. We thought about getting an independent title of our own to the property. The sale of the property would have reduced our claim. It was advertised for three weeks. I cannot say what is the usual time, but I heard from outside people it was too short a notice. The litigation with S.N.A. was going on at the time of the sale, and one of the partners of S.N.A. was claiming against the bank. On 7th November, 1910, I was asked by S.N.A. not to seek to enforce our mortgage by sale.....The property may have been at the time of these letters advertised for sale. For at least two months before the sale the property was advertised for sale. .....We instructed our solicitors to carry out the sale. I wished it at that moment to be considered a genuine sale as against S.N.A. I wished them to believe it a genuine sale, although I know it was nothing of the kind. Later on, far later, I informed S.N.A. it was not a genuine sale. That was after we came to terms with them, S.N.A. and settled. That was between September, 1912, and April, 1913..... Chellappa Pillay went to Braddell Brothers to act for him in connection with the purchase.....Messrs. Braddell Brothers were instructed independently of the defendants.....Chellappa Pillay was for a few months debited with interest on the special account No. 2 from date of sale to August 31st, 1912. He died in May, 1912. We debited him with interest on an amount with which he had nothing to do. The purchase would have been completed in February, 1911, but for being hung up. Chellappa Pillay was one of our customers. The arrangement was that he should get the conveyance and then sell the property bit by bit, and hand to the bank the receipts; and that he should mortgage the property to secure the whole sum owed by S.N.A. viz: $223,000 (vide letter E.1) I have made a mistake re amount. The defendants refused to carry out the contract because it was never intended to carry it out. When defendants had made the arrangements with S.N.A. there was no further necessity to carry the matter through..... Chellappa Pillay went to India in December, 1911. We got no acknowledgment from him. Chellappa was to take this property in hand and sell it for us. He was to get nothing for his trouble. I arranged with Chellappa that he was to go to a separate set of solicitors.....At beginning of June I left the Colony. Interest was charged on Chellappa's No. 2 account, because there is standing rule that interest must be charged. The entries are made every two months by clerks automatically. I must have seen it was charged myself. I know Chellappa particularly well.....Chellappa was a very honest man. He acted as adviser to the bank in chetty matters."

It may be thought that some of this evidence discloses Houtsma in an unfavourable light, but that after all has little to do with the matter, the only substantial point as to which the question of his credibility is here concerned being as to whether his accounts of his arrangements with Chellappa are true or not.

If they are true then after the settlement with S.N.A. there was no necessity either for continuing to carry out the arrangement with Chellappa as to a conveyance to Chellappa for the purpose of Chellappa dealing with the property according to the instructions of the bank or for keeping up any pretence that the sale was a genuine one.

Thirdly comes the evidence of Mr. Groskamp. He says:

"I am sub-agent of defendants in Singapore and have been in that position about four and a half years. I remember the auction sale in question in January, 1911. I attended the sale on behalf of the bank. I went during the sale with Chellappa Pillay to Mr. Houtsma. I took notes at the time which I have. I told

Mr. Houtsma what were the highest bids for each lot, 1st lot $19,000, 2nd lot $39,000, 3rd lot $73,000. Each lot was knocked down at $1,000 more, making $134,000. I told him it was arranged then that Chellappa Pillay should buy the lots at $1,000 each lot more than what had been bid. I went back and gave instructions to the auctioneer to knock down the property to Chellappa at the above prices. Chellappa certainly understood that he was buying the properties on behalf of the bank. There is no doubt about that."

There seems no reason to believe that Mr. Groskamp's evidence so far as it goes, is unreliable. The evidence of these 3 persons constitutes a strong case in favour of the defendants but the plaintiff draws attention to a variety of circumstances which took place at a later date and upon which he relies as indicating that this evidence does not give a correct account of what took place at the sale.

It is desirable to refer to these points in some detail.

1. On the 25th January, 1911, Chellappa appears to have made an agreement with a Chinaman to rent the property to him for $800 per month as soon as the lands were conveyed to him, Chellappa. It does not seem difficult to explain this, if Chellappa was to obtain a conveyance and act on the instructions of the bank with regard to the management and disposal of the property.

2. Chellappa instructed Messrs. Braddell Brothers (a well known firm of solicitors) to prepare a conveyance of the property from the bank to him whilst Groskamp apparently similarly instructed Mr. G. S. Carver (another partner in Messrs. Donaldson & Burkinshaw) to act for the bank in putting through the conveyance.

Neither Chellappa nor Groskamp appear to have informed Messrs. Braddell Brothers or Mr. G. S. Carver of the fact that the sale was not a genuine one and they both appear to have continued for some time arranging for the conveyance under the impression that it was a genuine sale to Chellappa.

It is difficult perhaps to explain how one member of the firm of Messrs. Donaldson & Burkinshaw could act in this way in ignorance of the true state of affairs which were known to two other members of the firm; all that can be said is that it is conceivable that in a large firm, such a position could occur. There is no clear explanation of when Mr. G. S. Carver became acquainted with the true facts of the case but at any rate on the 8th of March, 1911, it would seem from the following letter:

"Singapore, 8th March, 1911.

Dear Sirs,

Re **S. N. A. Jayamkondam Chitty.**

"Please let us have the draft conveyance at your earliest convenience. The writer Mr. Millard leaves on the 23rd instant and we are anxious to have the matter completed before he leaves.

Yours faithfully,

(Sd.) Donaldson & Burkinshaw."

"Messrs. Braddell Bros."

that Mr. Millard himself was concerned in urging forward the completion of the conveyance and it is in the absence of explanation somewhat unsatisfactory to find this state of affairs in view of the advice which Millard had himself given to the effect indicated in his evidence. As for Chellappa's failure to indicate the true nature of the transaction to Messrs. Braddell Brothers it is no more surprising than Groskamp's failure to acquaint Mr. G. S. Carver of the same facts.

3. Chellappa purported to pay the vendors (that is defendants) the necessary deposit on the total purchase price by a cheque drawn on the defendants.

The sum represented by this cheque, namely, $33,500 appears to have been debited to a special account and not to Chellappa's ordinary account —Chellappa never paid in any money to the credit of this account but as a matter of fact it appears from the bank books that this account was debited with interest from the date of the sale up till August, 1912. The plaintiff suggests that this debit of interest is another indication that the sale was a genuine one. Houtsma explains the matter by saying that it was merely a book entry under a standing rule made automatically; this may well be true. Why, it is asked, did the interest cease to be charged after August 31st, 1912; there is no clear explanation, it may be because the news that Chellappa was dead had then reached the defendants.

4. Apparently on the 8th of September, 1911, Chellappa made cross entries in his regular chitty books relating to the payment of the deposit of $33,500.

In these entries he nowhere refers to the fact that the sale was not genuine.

It is remarked that these entries were not made until some 8 months after the date of the purchase but it is possible that the entries *were* made because on that 8th of September, 1911, Chellappa appears to have drawn a cheque on defendants for $180 payable to the auctioneers

in respect of a plan prepared by them; and it is possible that when Chellappa drew this second cheque he thought it desirable to make a note of the transaction.

It does not seem to be likely that at that date he would have made any reference to the peculiar nature of the transaction.

5. Chellappa made a will dated the 22nd of May, 1912. In it he does not refer to this property at all; nothing material can be gleaned from this omission because his references to Singapore property and interest are meagre.

The plaintiff in his evidence states that shortly before Chellappa's death he had conversations with Chellappa with regard to his business affairs but that Chellappa never at any time mentioned the transaction of which this case is the subject.

The plaintiff thinks that it should be inferred that it is remarkable that, if this transaction had presented any unusual features, Chellappa should not have mentioned it either in his will or to his future executor.

On the other hand it would seem that another inference might equally well be drawn, namely, that Chellappa regarded the affair as of no importance because of its being inoperative.

6. About the end of 1911, Messrs. Donaldson and Burkinshaw appear to have instructed counsel to draw a statement of defence in an action brought by S.N.A. against the bank and in such instructions they intimate that the properties were sold by the bank to Chellappa and with this statement they do not couple any information as to the sale being to Chellappa as an agent.

We have no explanation of why this was done and *prima facie* it would seem to be an unsatisfactory attitude. It is of course possible that either these instructions were given in ignorance or that they were given with the intention of maintaining against S.N.A. the deception as to the genuineness of the sale.

The correctness of the position adopted by the advisers of the bank is not really under consideration here and it need only be said that these instructions are not necessarily inconsistent with the defendants' story. The above are the principal points and it is possible that there may be others of a similar nature but though they may all reflect unfavourably upon some of the participants in the whole affair it does not seem that they negative at all conclusively the alleged arrangement come to between the defendants and Chellappa.

I have given this case very earnest consideration and I have come to the conclusion that at the time when the sale took place it was agreed between the defendants and Chellappa that Chellappa should purchase the property on the defendants' behalf and *not* on his own account. Under these circumstances it would be improper for this Court to grant specific performance of such an agreement. A word is necessary with regard to the plaintiff's attitude; either he knew or he did not know of this agreement when he commenced these proceedings; if he did know his conduct is very wrong but if he did not know, as he maintains, then I think that he was justified in bringing his action.

I have come to the conclusion that he did *not* know and notwithstanding the letter dated the 7th of January, 1914, from Messrs. Donaldson and Burkinshaw to Messrs. Braddell Brothers, in which the former pointed out the nature of the evidence upon which they proposed to rely, I think that the circumstances of this case are such that there should be no order as to the costs either in this Court or in the Court below. Whatever amount was actually paid by Chellappa in connection with the matter (a small sum, the exact amount of which can be ascertained hereafter) should of course be paid out. The amount has been more than covered by a sum of $380 paid into Court. The appeal must therefore be allowed.

EBDEN, J.—The condition of affairs between defendants and the chitty firm Soona Ravena Ana as they stood at the beginning of 1910 purports to be set out in the opening paragraphs of Exhibit E17.

In February, 1910 Defendants obtained leave to enter judgment against the firm which I will hereafter refer to as S.N.A. for $235,509.62. On 1-4-10 Jayamkondam Chitty of S.N.A. by his substituted attorney S. N. Saminathan Chitty gave to appellants the submortage Exhibit C by way of security for the sum due.

By the end of 1910 appellants through their local manager, Mr. Houtsma, were arranging for a sale of the mortgaged property (See examination-in-chief of Mr. Houtsma).

On 7-11-10 Mr. Houtsma was asked by the submortgagor not to force a sale (see cross-examination of Mr. Houtsma and Exhibit E2). Mr. Houtsma refused to accede to this request (see exhibit E3) and on 12-1-11 the property under the mortgage was put up for sale at Public Auction and was knocked down to one Chellappa Pillay, a man of substance and also apparently a close confidant of Mr. Houtsma, for the sum of $134,000. The sale was confirmed and the payment of deposit was acknowledged by the auctioneers as agents for the appellants (see Exhibit A).

Chellappa paid the deposit by way of a cheque on appellants bank of which he was

apparently a regualr client, but the amount of the cheque was entered against him in a separate account on which interest was debited against him from date of sale up to 31-8-12 inclusive.

Chellapa died in May 1912. In face of the evidence for the defence which was first admitted and then ruled out by the learned trial Judge and the admissibility of which has been in dispute before us, I think that the fact that interest was so charged is significant.

Chellapa instructed his solicitors, Messrs. Braddell Bros., to proceed with the conveyance. He did so with reasonable despatch, for on 1-2-11 Messrs. Braddell Bros. were calling on Messrs. Donaldson and Burkinshaw, appellants' solicitors, for title deeds which were handed over on the usual undertaking. (see Exhibits E6 and 7). Appellants seem to have been fairly eager for an early conveyance (see Exhibits E8, 10, 11) draft of which was sent by Messrs. Braddell Bros. on 9-3-11 (see Exhibit E12). They were also taking advice as to levying execution on S.N.A. for the balance of their debt (see Exhibit E17). Messrs. Braddell Bros. in their letter of 8-6-11 (see Exhibit E14) referred to the approval of their draft Conveyance subject to the submission of a plan which they then forwarded. The conveyance would apparently have been completed forthwith but for the fact that on 24-5-11 S.N.A. filed their writ in Suit No. 250/11 against defendants for an injunction and for revocation of the mortgage of 1-4-10.

Consequently it was decided to postpone completion pending result of S.N.A.'s action (see Exhibits E15 and 16) and shortly afterwards Messrs. Braddell Bros. approved a draft appointment of Receiver and a supplementary agreement submitted by Messrs. Donaldson and Burkinshaw with a view to enabling Chellappa to obtain the rent on the properties agreed to be sold (see Exhibits E21 and 22). There is nothing to show whether these drafts were ever proceeded with but the fact remains that they were put up by appellants' solicitors presumably on the suggestion of their clients.

Chellapa went to India in January, 1912 and died in the following May. In meantime appellants had to meet the action in Suit 250/11 brought against them by S.N.A., and Sir Evelyn Ellis was called in as counsel to settle the defence.

It was not disputed but that the instructions of appellants' solicitors to Sir Evelyn Ellis were put in before the trial Judge though they were not marked by him as an exhibit. They were produced again before us. The important words so far as the present case is concerned are as follows:—

> "On 12-1-11 the Society offered the properties comprised in the second part of the schedule at auction. The whole was purchased by N. C. Chellappa Pillay for $134,000. Pending these proceedings the completion of the sale has been held over by agreement with Chellappa."

It is hard to suppose that appellants' solicitors issued these instructions without consulting their clients. Suit No. 250/11 was however not proceeded with as the parties came to terms which were first recorded in the letters Exhibits E4 and E5, dated 23rd and 24th 12-12, respectively and afterwards embodied in the agreement for compromise exhibit H dated 11-4-13.

This agreement contains the first open disclosure of the alleged fact on which appellants have relied for their defence in the present suit, that they themselves were the purchasers of the mortgaged property at the sale held on 12-1-11, Chellappa having been their nominee and no more. It appears from the copy of notes of evidence on the record that the onus was held to lie on appellants and that Sir Evelyn Ellis for respondents opposed the tender of evidence in support of paragraph 4 of the Statement of Defence. The learned Trial Judge over-ruled the objection and decided that the evidence might be led "to prove either illegality or that the contract sued upon is void or voidable." It was led accordingly. He ruled the evidence out in his judgment which does not dispose of the issue, on which both parties seem to be agreed, whether there was a sale of the beneficial interest or not. Respondent's counsel have argued before us that the evidence is inadmissible by reason of section 92 of the Evidence Ordinance and on the ground that a party cannot allege his own fraud. It has been submitted for appellants that the case is within the first proviso to the section. Difficulty sometimes arises out of the fact that the Colony has adopted the Indian Evidence Act without various concomitant Indian Statutes.

With reference to section 92 of the Ordinance in particular it is to be observed that the Colony has neither the Indian Contract Act nor the Indian Specific Relief Act. Its Courts have to apply the English Law of Contract and are vested with a general equitable jurisdiction.

The first Proviso is that any fact may be proved which will invalidate the document under dispute.

What we have to consider is whether according to the law which we have to administer and the principle which we have to follow the facts alleged by appellants will, if proved, invalidate the contract for sale to Chellappa. It is well established law that a mortgagee cannot sell to himself either alone or with others, either directly or through an agent or a trustee. Such a sale is inoperative and a nullity.

It seems to me that such nullity is a fact to be properly regarded as *ejusdem generis* with those of which examples are given in the proviso even if it is not to be actually identified with some one of them, and that proof of it must operate to invalidate the contract for sale.

As to the question of fraud it was submitted for appellants, in effect that the maxim that a man cannot be heard to allege his own fraud cannot be allowed to cover a fraud by the opposing party.

If the facts throughout were as alleged by appellants it is impossible to doubt but that Chellappa was aware of the projected fraud against S.N.A. and was an accomplice in it. If that is so then Chellappa's executor cannot take advantage of a fraud in which his testator joined. I think therefore with the rest of the Court that we have to consider the evidence brought by appellants. But admissibility is one thing, credibility and sufficiency are another. Evidence admitted under Proviso 1 to section 92 of the Evidence Ordinance has to be weighed against the acts and conduct of parties.

In this instance I do not find it acceptable in its entirety and that part which I do find acceptable I do not find sufficient to support appellants' case.

The oral evidence for appellants consists of that of Mr. Millard, of Messrs Donaldson & Burkinshaw, taken *de bene esse*, and that of Messrs. Houtsma and Groskamp of the appellant Society given before the Trial Judge.

Mr. Millard's evidence was doubtless given with all care. It has to be remembered however that he was speaking nearly four years after the event.

Also that the negotiations between appellants and Chellappa, which we are asked to believe amounted to no more than a pretence, passed out of his hands in March, 1911, when he went on home leave.

If he understood Chellappa aright at the interview in his office it is clear that there was an arrangement whereby Chellappa was to buy as agent for appellants in event of a satisfactory price not being reached at the auction. But he does not mention anything about what was to be regarded as a satisfactory price. On the other hand he says that Mr. Houtsma informed him that the value of the property was about $130,000.

So far as Mr. Millard's evidence goes it is not impossible that Mr. Houtsma's proposal to buy in for the Society through Chellappa may have been due to uncertainty as to whether the full value of the property would be obtained at a forced sale. His story moreover stops short of the actual sale. He was in Mr. Houtsma's office while the sale was proceeding and if he could corroborate Mr. Houtsma's evidence as to what passed between the latter and Chellappa that morning his testimony would be cogent. But all that he has to say is that Mr. Groskamp came into the office with a chitty but that he did not even notice whether it was Chellappa or not. Mr. Millard was examined in absence of respondent's counsel who appeared next day and objected to the evidence particularly as touching a statement said to have been made by Mr. Houtsma to Mr. Millard on some occasion subsequent to the sale, as to the intention that Chellappa should execute a mortgage and dispose of the property for appellants' benefit. I think that there were grounds for objection to the admission of the evidence on the particular point at the time as the evidence was not in corroboration of any testimony already given. It was merely anticipatory of a possible statement to be made subsequently by Mr. Houtsma in whose evidence it does not appear. It is not suggested that Chellappa was present on this occasion.

The learned Trial Judge has said that he admitted the evidence which he afterwards excluded because he thought that it might prove want of consensus between parties " as set forth in the document sued upon."

It is not disputed but that Mr. Houtsma gave the contract for sale (Exhibit A) through his agents the auctioneers with full knowledge of its purport and of his own freewill. If therefore Chellappa bought on his own behalf *without any fraud on appellants*, section 92 of the Evidence Ordinance will not allow any question of want of consensus to be raised. The section is particularly designed to prevent lack of consensus from being set up under such circumstances. It seems to me as regards consensus that the issue on which appellants have to depend is whether on the day of the sale there was a clear undertaking between themselves and Chellappa that Chellappa should buy the property in at $134,000 as appellants' agent. Mr. Millard's evidence if admissible shews firstly that at some date before the sale it was arranged between appellants and Chellappa that Chellappa should buy on appellants' behalf *if a satisfactory price should not be reached at the auction* and secondly that Mr. Houtsma valued the property at about $130,000. The other evidence on this issue is that of Mr. Houtsma and his sub-agent Mr. Groskamp. Mr. Houtsma has sworn that he attended the sale with Mr. Groskamp; that during the sale Mr. Groskamp came in to his office with Chellappa, Mr. Millard being present, and told him that the highest offer was $133,000; that he therefore instructed Chellappa to offer $134,000, on appellants' behalf; and that there was " no idea of Chellappa buying on his own

account" Mr. Groskamp does not mention Mr. Houtsma's presence at the sale. Mr. Houtsma's evidence seems to suggest that he was in two places—the auction room and his office—at the same time. Mr. Groskamp says that he himself attended the sale; that he went during the sale to Mr. Houtsma and told him the amounts of the highest bids for the three lots in which the property was put up for sale, the aggregate being $131,000 and not $133,000 as stated by Mr. Houtsma; *that he told Mr. Houtsma "that it was arranged that Chellappa should buy the lots at $1,000 each lot, more than had been bid"*; that he went back and gave instructions "to the auctioneers to knock down the property to Chellapa at the above price."

Mr. Houtsma and Mr. Groskamp are not quite at one as to events during the sale, but their evidence does seem to unite in pointing to one fact, namely that until the day of the sale there was no arrangement for Chellapa to bid on appellants' behalf beyond $130,000 the estimated value of the property. The letter exhibit E1 was put in by appellants' counsel during examination-in-chief of Mr. Houtsma. It is signed by Mr. Cecil Carver. It is said by Mr. Millard to have been written on his own request and reminder.

Mr. Cecil Carver does not touch the case at any other point, and in the matter of this letter he appears to have been no more than a channel of communication between Mr. Millard and Mr. Houtsma. I observe that in the letter the following words are used "*The sale to the Society as mortgagee to another person as your agent is voidable.*"

I do not know of any precedent to shew that such a sale is merely voidable and not an absolute nullity. I take it that the writer was referring to the rights of the mortgagors S.N.A. in event of their discovering the character of the transaction as now alleged. As to the matter of the proposed mortgage referred to by Mr. Millard and and in the latter exhibit E1; the property was ostensibly sold for $134,000 the sum named in the letter.

Mr. Houtsma swore in cross-examination that the arrangement was that Chellappa was to execute a mortgage for the *whole sum due* from S.N.A., namely $223,000.

Then he was confronted with the letter Exhibit E1 and said "I have made a mistake." But it is particularly alleged in paragraph 4 of the statement of defence that it was arranged that the premises should be conveyed to Chellappa who was to give appellants a mortgage *for the amount owing on the security of S.N.A.'s mortgage of 1-4-10.* If the sale was a genuine one then nothing is more probable than that there would be a mortgage. Chellappa was a money-lender, and appellants would have been glad to take a mortgage from a man of his substance.

But it seems hardly likely that Chellappa if he bought as agent only would have been ready to compromise his Estate by executing a mortgage for the full value of the land with interest, let alone for the higher sum named by Mr. Houtsma for no consideration whatever and merely in order to render a gratuitous service to appellants. Mr. Houtsma appears to have been rather driven under cross-examination to find reasons for the transactions and his evidence on the subject does not read very convincingly.

He says that, notwithstanding paragraph 17 of the claim in Suit 250 of 1911, S.N.A. knew that no sale had taken place. If S.N.A. had been aware of the alleged fact at the time I think that it may be taken as a foregone conclusion that they would have informed their solicitors Messrs. Sisson & Delay, and that the latter would have jumped at the opportunity of exposing it both in their writ and in their letter to appellants' solicitors on the subject of the attachment of S.N.A.'s interest towards satisfaction of the balance of the debt due to appellants (see Exhibit E19).

I have referred to Mr. Groskamp's evidence which touches the alleged meeting on the day of the sale only.

Appellants have put in evidence two Municipal Notices dated 11-3-12 (Exhibits F1 and 2) calling upon them to abate certain nuisances on a part of the property under the sale, and Mr. Houtsma's statement is that appellants have spent a sum exceeding $24,000 in compliance.

Respondents do not deny that this is a good ground of counterclaim but it does not affect the case on the claim. The agreement for compromise made in April, 1913 is admitted by appellants' counsel to have been written by Mr. Millard, who had returned from Europe some time previously. That may account for the mention in the agreement of the alleged fact that Chellappa was only a nominee.

I think that I have touched on all the evidence for appellants on the claim.

As to the evidence of Mr. Millard, it is to be observed that it was taken before disclosure of documents. Otherwise I conceive that Respondent's counsel would have found matter for cross-examination. A question on which I should have liked to have had Mr. Millard's answer is whether Mr. Houtsma ever consulted him as to proceeding to recover the balance of the debt of S.N.A. after allowing for the proceeds of the ostensible sale.

Mr. Houtsma actually did proceed to that end in May, 1911, after Mr. Millard's departure (See Exhibits E17, 18, 19). This is a part of the acts

and conduct of parties in the light of which appellants' evidence has to be considered and to which I now come. The matter of acts and conduct may I think be conveniently examined firstly with regard to the dealings between Chellappa and appellants through their respective solicitors and secondly with regard to their independent doings. I have referred at commencement of my judgment to all that passed between Messrs. Braddell Bros. and Messrs. Donaldson and Burkinshaw on behalf of their respective clients between the day of the sale and the letter of the former dated 10-9-13 enquiring on behalf of respondent when appellants might be proposing to complete. The negotiations as shewn by the exhibits speak for themselves. They are consistent only with one of two things, namely either a genuine sale or as counsel for appellants have asked us to find—sustained effort to fabricate evidence to be used in support of the pretence of a genuine sale in any litigation or other dispute with S.N.A.

As to the acts and conduct of Chellappa and Mr. Houtsma independently of each other I will first take those of Chellappa. Chellappa died in May, 1912, so we are without his version of what passed at the alleged meeting in Messrs. Donaldson and Burkinshaw's office before the sale and again at the alleged meeting in appellants' office during the progress of the auction.

But as to what happened after the sale it is clear that Chellappa went with all reasonable expedition to Messrs. Braddell Brothers and instructed them to prepare the conveyance as on a genuine sale. Mr. Houtsma has sworn in re-examination that he arranged with Chellappa to go to a "separate set of solicitors."

It might have been supposed that Mr. Houtsma, having been advised by Mr. Millard of the impropriety of his proposal, would have preferred to confine all knowledge of it to as narrow a circle as possible and to have the conveyance prepared by Mr. Millard.

But be that as it may, the fact remains that Chellapa went to the solicitors to whom in his will he directed his executors to go for the conduct of business in Singapore. If the sale was otherwise than genuine he was risking more than were the appellants by not disclosing the fact to his solicitors. The Tamil letter dated 25-1-11 (exhibit M. Translation M2) was put in without objection, It purports to be a "receipt" by Chellapa to one Leong Kum. It is really an acknowledgment of $100 earnest money on account of an undertaking by Chellapa to make an "agreement" for the letting of the land so soon as he can get the conveyance. It is not suggested that this $100 was passed to appellants or that they were ever consulted about the transaction which is not in accordance with the arrangement alleged by appellants (see Mr. Millard's evidence adopted by Mr. Houtsma) that Chellappa was to act on the appellants' instructions as to the management and realisation of the property which was to be sold in lots. The act appears to have been inconsistent with anything but a beneficial interest on Chellappa's part.

Chellappa's disbursements in connection with the transaction were entered on 8-9-11 in his day-book (exhibit J. Translation J1) and in his ledger under the head of two separate accounts namely "Debit and Credit account of cheque 2 Dutch Bank" (exhibit K. Translation K1) and "Debit and Credit account of cost price of land at Jalan Besar, Lavender Street, Kallang Road and Syed Ali Road" (Exhibit K2. Translation K3). I did not understand appellants' counsel to deny that these entries are against them except in so far as we are asked to believe that everything done by Mr. Houtsma and Chellappa up to the time of the compromise was done to forward a plot for the deception of S.N.A.

Comment however was passed on the fact that the entries were not made till eight months after the sale.

But if Chellappa had been concerned to fabricate evidence for use against S.N.A. he would have made his entries immediately. According to Mr. Houtsma the conveyance was expected to be completed in February. The draft was submitted on 9-3-11 and approved by appellants' solicitors subject to the production of a plan which was not ready till 8-6-11 (see exhibits E10, 14 inclusive).

The matter dragged on apparently for an unexpected time. Meanwhile the transaction was inchoate. Chellappa's cheque for one fourth of the purchase money was debited to a special account and under the circumstances there does not seem to me to have been anything strange in Chellappa having postponed the entry in his own books. He had his cheque book, and the counterfoil, Exhibit L.1, has been put in. After completion was indefinitely postponed it was time for him to make an entry which he did on the day on which he paid Messrs. Coghlan & Company for the plan which had been prepared to accompany the conveyance.

I do not think that it is to be supposed that Chellappa would have made these entries if he had not intended to assert and to abide by the genuineness of the sale. Finally there is the matter of his will to be considered (Translation Exhibit N). It has been observed on behalf of appellants that the will specifies the landed property in India but not that in Singapore. The reason for giving details of the property in India is obvious.

Chellappa had to shew that it was that he calls "earned as self acquisitions" and not ancestral property subject to the Hindu Law governing devolution.

His estate in the Colony alone has been sworn at $284,000 gross and $164,000 nett value, but the will does not specify any particular property either in the Colony or in Johore except in so far as it gives directions for the application of the proceeds of the sale of a cocoanut garden at Batu Pahat.

It contained instructions as to litigation in progress at the time and ordered the executor to conduct business in Singapore through Messrs. Braddell Brothers whom Chellappa had instructed to prepare the conveyance as on a genuine sale. But it made no reference to the sum of $33,680 of Chellappa's money already at stake in the transaction under dispute as we may suppose it certainly would have done if Chellappa had not intended his book entries (exhibits, Translations K1 and 3) to be taken in support of a genuine purchase. I think that it is fairly clear that by 8-9-11 Chellappa was intending to treat the sale as a genuine one even if he did not intend, as I think probable that he did intend, to do so from the first.

I think that his letter (exhibit translation M2) goes far towards showing his original intention.

If all that Mr. Houtsma has sworn to is to be accepted, the intention was in fraud of appellants. But, as Mr. Houtsma said in answer to the Trial Judge *Chellappa was a very honest man.*"

On Mr. Houtsma's side there are two matters which look to me to be significant.

The sub-mortgage to appellants was to secure a sum for which appellants had obtained leave to enter judgment against S.N.A.

Mr. Houtsma took his remedy by way of sale in exercise of his powers as mortgagee after notice to the sub-mortgagors. (See Mr. Van Someren's letter of 7-11-10 Exhibit E2). It does not appear that there was any discussion between Mr. Houtsma and Mr. Millard as to the right of appellants to proceed for recovery of the balance of the mortgage debt after a sale to his own agent.

But Mr. Millard told Mr. Houtsma that such a sale would be " voidable by any party interested in the equity of redemption." I think that Mr. Millard would have expressed himself more correctly if he had said that such a sale would be absolutely void unless ratified by all parties interested in the equity of redemption.

But giving Mr. Houtsma credit for ordinary understanding I think that it must have been clear to him from Mr. Millard's advice, that to proceed for the balance of the debt after a sale to his nominee without disclosing the facts of the case to S.N.A. would be an actual step in fraud.

This may be at the back of Mr. Houtsma's statement that notwithstanding paragraph 17 of the Statement of Claim in Suit 250 of 1911 S.N.A. knew that no sale had taken place. Some time after Mr. Millard's departure either Mr. Houtsma or Mr. Groskamp consulted Mr. Gilbert Carver into whose hands the conduct of their business had apparently passed, and Mr. Gilbert Carver on the assumption that the sale was genuine advised in writing that appellants could levy execution for the balance of their judgment debt after giving credit for the proceeds of the sale (See exhibit E17). Mr. Houtsma in his letter of 16-5-11 (exhibit E18) instructed Mr. Gilbert Carver to act accordingly and Mr. Gilbert Carver did so. thereby evoking the letter exhibit E19 from Messrs. Sisson and Delay, Solicitors of S.N.A. If the members of S.N.A. had been aware at the time that Chellappa was appellants' nominee I think that we may take it for granted that they would have told their solicitors and that their solicitors would have written quite a different letter. Appellants could take out attachment only in respect of the surplus still due, and it seems to me that Mr. Houtsma did, in effect, approbate the sale so far as S.N.A. were concerned.

If this is so, then, though the act may not create an estoppel under section 115 of the Evidence Ordinance 1893 it has much the same effect.

The attachment was not a part of the " plot to deceive "—to borrow appellants' counsel's own expression on which the defence is based.

It was undertaken quite independently of Chellappa. If I am right in thinking the attachment to be a step in actual fraud if undertaken after a sale to an agent, then we cannot hear Mr. Houtsma allege his fraud or deny that he adopted the sale as a genuine one.

The manner in which Chellappa's cheque in part payment of the purchase money was dealt with also seems to call for notice. Chellappa had a current account with appellants. The cheque however was debited to a separate account.

But that is in no way incompatible with a genuine sale. It seems to have been only a reasonable course to take pending completion of the conveyance especially as trouble with S.N.A. was on the carpet. If the sale was not genuine the cheque had served its purpose of throwing dust in the eyes of the auctioneers and might have been returned to Chellappa or destroyed. There was no need to make the entry at all unless it was done as part of the " Plot of Deception." If it was for that purpose the charge of interest

written up every two months to the end of August, 1912 was quite an artistic touch.

It is said by Mr. Houtsma that interest was charged in compliance with a standing rule of the Bank, but a rule which requires interest to be charged on a non-existing debit seems rather unnecessary. The last entry of interest was in the order of things made not before the beginning of September, 1912. The next entry would have been made in November, 1912, by which time compromise with S.N.A. was in the air. The terms of the compromise were put into writing in the following months (See Exhibits E4 and 5).

The suggestion on behalf of appellants on the point is that the special account was closed as there was no necessity to proceed with the conveyance to Chellappa after the compromise had been arranged.

I see nothing unfair in the suggestion of respondent's counsel that if Mr. Houtsma is equal to basing his present defence on the ground of an elaborate plot with Chellappa as accomplice for the purpose of a fraud on S.N.A. he was quite capable of throwing over the contract with the dead Chellappa when he found his arrangements with S.N.A. shaping themselves to his wishes, especially as he knew that he had some ground work to support him in his consultation with Mr. Millard. There seems reason to suppose that the property had increased in value since the sale. On the whole case I think that we were bound to consider the evidence tendered for appellants, but that it is impossible not to look askance on a defence based on such grounds.

But, beyond that, the contract is clear *prima facie* evidence of a genuine sale and I think that the acts and conduct of Mr. Houtsma and of Chellapa in their dealings both with each other and independently from the date of the sale onwards must be taken to establish that they both adopted the sale as genuine not long after the event even if they did not do so at the time.

In particular I do not think that the attachment made on Mr. Houtsma's instructions for the recovery of the balance of the debt can be regarded in any other light.

Plaintiff Respondent in reply to counterclaim expressed himself willing to pay all sums expended by appellants in compliance with Municipal Notices but has not admitted the correctness of appellants' figures which have been adopted in the judgment of the Court below.

However he had not cross-appealed or raised argument on the subject. So I think that our order should be that the appeal be dismissed and the judgment of the Court below affirmed as it stands.

As to costs, if my view of the case is that of the majority of the court, I think it follows that the order should be costs to respondent.

If I am dissenting, I am inclined to think that appellants deserve to be deprived of their costs and that both parties should pay their own costs in both courts. I do not think that a party whose whole defence is based on his own " plot to deceive " is deserving of costs under the circumstances of this case.

EDMONDS, J.—The plaintiff as executor of N. S. Chellappa Pillay sued the defendants for specific performance of an agreement entered into on 12th January 1911 to sell certain lands or in the alternative for damages. The defendants in their Statement of Defence in effect said that, holding a sub-mortgage over the property from Jayamkondan Chitty agent for the firm of S.N.A. to secure an overdraft of $234,982.97 and interest in exercise of a power of sale as mortgagees, they sold the said property at public auction to Chellappa Pillay for the sum of $134,000 having previously contracted with him that he should buy the same as their agent and hold the property after conveyance as their trustee, giving them a mortgage for the amount of S.N.A.'s indebtedness, it being agreed that no money should pass either upon the said conveyance or upon the said mortgage and that the said premises should be held in trust for the defendant absolutely.

The plaintiff in reply denied such an agreement of agency and trust and said that if made they were illegal and void and that the provisions of the Statute of Frauds had not been complied with. The objection as regards the non-compliance with the Statute of Frauds was not proceeded with. The contract on which plaintiff sued was an auctioneer's memorandum of sale setting forth that at the sale of the property by auction this 12th January, 1911, Chellappa Pillay was declared the purchaser at the price of $134,000 and that he had paid to the auctioneers as agents for and on behalf of the vendors $33,500 by way of deposit and agreed to complete the purchase according to the conditions of sale. The particulars and conditions of sale dated the 5th January, 1911, shew that the property comprised numerous houses with a considerable rental. The vendors reserved the right to fix a reserve price and to buy in by agent. This reservation seems to me to have some significance. It shews that the defendants publicly announced that they contemplated buying in through an agent.

The learned trial Judge gave judgment for the plaintiff mainly on the ground that evidence as to plaintiff's having agreed to act as the

defendant's nominee in the matter could not be considered owing to section 92 of the Evidence Ordinance; but also (as he has stated) having in his mind the principle that defendant could not be allowed to give evidence of matter shewing his own fraud.

But he went on to say "Even if the defendants could make use of and rely upon the evidence adduced by them I cannot see that they would be successful. That evidence would not satisfy me that Challappa acted in the purchase merely as defendant's agent. Even on that evidence and the pleadings I should find that Chellappa Pillay entered into the contract as principal not as an agent." But he qualifies this by adding. "The question as to whether behind all this, there was a secret and oral agreement between Chellappa Pillay and the defendants under which Chellappa Pillay agreed to hold the property in question upon trust for the defendants and any further questions as to whether such trusts can be enforced or as to other terms of such secret agreement if any, need not be considered in this case." "As regards such trust" he said, "I make no declaration on that point, and so far as this case is concerned that question is *res non judicata.*"

The plaintiff claims that this is a definite finding of fact; and that even if the evidence is admissible, it was not strong enough to support the defendant's contentions. But having regard to the qualification to the finding added by the learned Judge, it seems to me that he did not definitely decide on the effect of such evidence. In my opinion, if the evidence is admissible, a decision must be made as to its credibility and what (taken in conjunction with other facts established by documentary evidence) is proved by it. A careful analysis of the evidence is therefore requisite. The defendants early in 1910 had a banker's account with the firm of S.N.A. upon which there had been for a long time a large overdraft. The defendants closed the account, sued for the debit balance and in February, 1910, obtained judgment. On 1st April, 1910, the defendants obtained from Jayamkondan Chetty (the local representative of the firm of S.N.A.) a sub-mortgage to secure $235,509.62 the amount of the judgment. In spite of this security at the end of 1910, the defendants became anxious about the overdraft of S.N.A.

Replying to a letter of 26th October, 1910, Jayamkondan Chetty through his solicitor in the letter Ex. E2 dated 7th November, 1910 asked for time to pay off the mortgage. A sale was evidently then in contemplation; because the defendants' solicitors reply in a letter Ex. E3 dated 24th November, 1910, that their clients will not postpone the sale. The defendants' solicitors were Messrs. Donaldson & Burkinshaw; a firm of advocates and solicitors possessing a very high reputation in Singapore. Mr. Millard, a partner in that firm, says that in or about November or December, 1910, Mr. Houtsma, the defendants' agent consulted him as to what steps he could take to recover money secured by the mortgage. But it would seem, from the letters I have just referred to, that he must have been consulted on this subject in October. "In or about November or December, 1910," says Mr. Millard, "Mr. Houtsma consulted me as to what steps he could take to recover money secured by the mortgage.

"I advised him there were three courses open (1) to sell the property and sue for any deficiency (2) to foreclose the mortgage (3) to enter into possession. He did not like any of the remedies; the first because the property was of *much less value* than the amount advanced and it would be doubtful if he could recover the deficit after sale; the second, because I advised him he could not sue the mortgagor after foreclosure without reopening the foreclosure; and the third, because it brought him no nearer to the payment of his principal and interest. I further told him at that time it was *impossible to take foreclosure proceedings* because the original mortgage (of which the defendants were the sub-mortgagees) was made by Goh Tat Pang as the executor of Goh Siew Swee and that Goh Tat Pang had since died and no administration '*de bonis non*' had been taken out to the estate of Goh Siew Swee deceased."

Therefore owing to facts probably not contemplated by him when he took the mortgage Mr. Houtsma found himself debarred from foreclosure in the ordinary way.

Mr. Houtsma then said the defendant bank would buy the property either themselves or through an agent. Mr. Milliard advised that a mortgagee could not buy the property sold by him and that any such purchase either in the mortgagee's own name or in the name of an agent or a nominee would be voidable by any party interested in the equity of redemption. Mr. Houtsma was annoyed and considered that the law did not give adequate protection to mortgagees. *He insisted that there* was no harm in the course *he proposed* because the value of the property was only about *$130,000* whereas the (original) mortgagor had mortgaged for $350,000 and the defendants had advanced $235,000 (odd) on the sub-mortgage; and he decided to carry out his intention.

All this did shew obstinacy, wrongheadedness, and an intention to try expedients which have no legal validity; but whether it also shewed fraudulent and dishonest intention I will consider later.

Mr. Millard in accordance with Mr. Houtsma's instructions prepared conditions of a sale arranged for the 12th January, 1911.

Mr. Millard says:—

> "Shortly before the sale Mr Houtsma came to see me and brought Chellappa Pillay with him. He told me that his bank and Chellappa Pillay had had business transactions for a long time and were on terms of business friendship. Chellappa Pillay understood the position; he was to bid as agent of the bank. Chellappa Pillay arranged with Mr. Houtsma in my presence that if he was the highest bidder he would take a conveyance of the property and act according to the instructions of the bank with regard to the management and realisation of the property. There was nothing to shew that he held the property for the bank but it was mooted that a mortgage should be given to the bank; that was left however to a later meeting."

Chellappa clearly therefore undertook to act according to the instructions of the bank. And if the bank gave him the legal title it is obvious to me that they would want some security; either the possession of the title deeds or a formal mortgage.

Mr. Millard still objected to the course and informed Mr. Houtsma that he would have to put his objections on record in a formal letter addressed to the defendants. Mr. Houtsma agreed to this.

Mr. Millard did not attend the sale; but during the time the sale was going on he went to see Mr. Houtsma because he had received a letter from Messrs. Sisson and Delay challenging the validity of the sub-mortgage.

Mr. Houtsma however insisted on the sale going on.

Whilst Mr. Millard was there, Mr. Groskamp, the assistant manager came in with a chitty, who from Mr. Groskamp's evidence it appears was Chellappa Pillay; though Mr. Millard himself cannot be sure of his identity.

Mr. Houtsma's evidence is to the same effect as that of Mr. Millard. He positively asserts that Chellappa bought merely as agent of the defendants and never at any time claimed to have purchased for himself. He says he knew Chellappa well and that Chellappa acted as adviser to the bank in chitty matters.

Though Chellappa was to get no commission for his assistance in the matter, it is plain that a money-lender has strong motives to be on good terms with the manager of the bank with which he deals.

The sale was held in public auction rooms. Messrs. Houtsma and Groskamp were present at the opening of the auction. But before its conclusion Mr. Houtsma returned to the bank. The property was put up in three lots. Mr. Groskamp took notes of the bids; the highest respectively being $19,000, $39,000 and $73,000; a total of $131,000.

Mr. Groskamp then went with Chellappa Pillay to Mr. Houtsma and reported the biddings. Mr. Houtsma's recollection is that he reported that the total amount of the bids was $133,000 but I think his recollection is clearly inaccurate and this merely indicates that Mr. Houtsma's memory as to figures is uncertain *or that he was in a confused state of mind in the witness box.*

Mr. Houtsma did not want to let the property go at this price; so he instructed Chellappa to offer $134,000 for the property, *i.e.* $1,000 more for each lot.

As Chellappa was to be the ostensible purchaser arrangements had to be made for payment. Chellappa already had one account with the bank. For the purposes of this transaction a special No. 2 account was opened on which an overdraft was allowed. Chellappa was declared the purchaser by the auctioneer at the price of $134,000. He paid the deposit money $33,500 by a cheque drawn on the No. 2 account.

Reading the evidence given (in cross-examination) by Mr. Houtsma I thought the plaintiffs were questioning the fairness of the price obtained; but I understand that the plaintiffs do not now allege that the price obtained was less than the full price obtainable at the time of auction.

Mr. Houtsma's evidence on this matter is not very clear. He first says the sale was duly advertised for three weeks and seems under the impression that the notice of sale had been inadequate but then later, on being shewn the Ex. E2 and E3, says "For at least two months before the sale the property was advertised for sale." And the cross-examining counsel left it at this.

The Ex. E2 and E3 (especially the latter dated the 24th November, 1910, refusing "to postpone the sale") certainly suggest that a date for the sale had been fixed a long time in advance.

For the purpose of this suit I think it must be assumed that the price obtained was a fair one.

Mr. Houtsma says he arranged with Chellappa Pillay that he should go to a separate set of solicitors to get the conveyance put through.

As he was carrying through a transaction which he had been warned could be set aside by those interested in the equity of redemption, it seems to me not unnatural under the circumstances that he should endeavour to give the affair a semblance of reality.

Accordingly Messrs. Braddell Brothers were instructed by Chellappa Pillay to prepare a conveyance without his disclosing that he was a mere nominee purchaser.

Several short letters passed between this firm and Mr. Millard with reference to the title deeds etc. Mr. Millard omitted to point out that the sale to Chellapa, was merely a transfer to him as nominee of the defendants.

The conveyance was first delayed for the preparation of a plan; the cost of which Chellappa defrayed by a cheque for $180 drawn on his account No. 2.

The amount was comparatively small and the fact that he operated on his special account for it seems to me to indicate that the purchase was a very special transaction.

On the 23rd March, 1911, Mr. Millard went on leave; and the conveyancing department of Messrs. Donaldson & Burkinshaw was taken over by Mr. G. S. Carver who was at that time unaware that Chellappa had purchased as nominee. By letters of the 9th and 17th June, Ex. E15 and Ex. E16 it was agreed to suspend the completion of the conveyance pending the decision of a claim against the defendants to set aside the mortgage under which they purported to sell this claim was not completely settled until April, 1913.

Mr. Millard had told Mr. Houtsma that he would have to write a letter to the bank putting on record what advice he had given; but owing to the pressure of business he did not himself write it. However he spoke to Mr. C. I. Carver about the matter before leaving and subsequently wrote to him.

Consequently, on the 16th May, 1911, Mr. C. I. Carver (the head of the firm of Donaldson and Burkinshaw) wrote the letter Ex. E1 to Mr. Houtsma setting out the facts of the case as understood by his firm and warning him that not only was the sale voidable, but there was the further risk of Chellappa dying and his representatives claiming the sale to be an absolute one. He mentions that a conveyance is being made out in favour of Chellappa and instructions given to his firm to prepare a mortgage for the amount of the purchase price $134,000 the intention being that Chellappa Pillay should sell portions of the property from time to time paying over the proceeds to the defendants.

This letter (admissible under section 157 of the Evidence Ordinance as corroboratory evidence) coupled with the evidence of Messrs. Houtsma and Groskamp seems to me to place beyond any possibility of doubt the main facts of the defendants' story.

It is undoubtedly Mr. Millard's evidence which produces this certainty in my mind. Whatever mistakes Mr. Millard may have made, his evidence supported as it is by Mr. C. I. Carver's letter Ex. E1 is obviously substantially true. It certainly was not questioned by cross-examination.

Mr. Millard of course only speaks as to what Chellappa had agreed to shortly before the actual sale.

But in view of that clear undertaking to act as the agent of the defendants in buying this property and to act on their directions afterwards, I cannot entertain the slightest doubt as to the accounts given by Messrs. Houtsma and Groskamp in respect of what took place at the auction itself; though probably without such corroboration any Court would have doubts as to Mr. Houtsma's evidence.

It is now suggested by the plaintiffs that if Mr. Millard had not left Singapore before Mr. Houtsma's evidence was given (he left for military service) he would have been cross-examined. The plaintiffs however were already in possession of all the main facts as I shall endeavour to shew later.

It is argued that if Messrs. Donaldson and Burkinshaw had really believed in the position so clearly put in their letter Mr. Millard would have disclosed to Messrs. Braddell Brothers the fact that Chellappa was to take the conveyance merely as nominee of the defendants. But whatever may have been the reason of Mr. Millard's omission to mention this, whether it was the expectation that Chellappa would himself have disclosed to his own solicitors his true position or mere oversight; it is quite clear to my mind that the main facts now asserted were all known to Mr. Millard.

The question is asked, if Chellappa were a mere nominee, why should he or his solicitors trouble with requisitions as to title or how could Mr. Millard seeing that they failed to understand the true position omit to explain it?

Well if those cognisant of the secret arrangement died or left the colony the position to be assumed by Chellappa Pillay in taking the legal title and giving a mortgage would be risky unless the legal title were a good one.

Possibly therefore Chellappa desired a thorough examination of the title by independent solicitors. It may even be that Mr. Millard thought such a course desirable.

Possibly Mr. Millard failed to appreciate that Messrs. Braddell Brothers had not had the true position disclosed to them by their own client.

It is said "If a mortgage was contemplated, why was not this disclosed to Messrs. Braddell Brothers-"

The reason may be that once the title had been conveyed to Chellappa with all the formalities of a beneficial transfer and once he was satisfied as to the validity of the legal title, he and the defendants considered it simpler to have subsequent transactions (including the mortgage) put through by the solicitors of the defendants.

Mr. C. I. Carver's letter Ex. E1 clearly shews that his firm had instructions to prepare the mortgage. The amount to be secured by the mortgage has been a subject of comment. The Statement of Defence says it was to be for the amount owing upon the security; and Mr. Houtsma in his evidence in cross-examination first of all confirmed this, saying it was to secure the whole sum owed by the S.N.A.

But on being shown Mr. Carver's letter Ex. E1 he said he had made a mistake.

Obviously he did make a mistake and a mistake was made in the pleadings.

The plan was to make the transaction appear a real one. A mortgage for a $100,000 more than the bank had sold for would tend to expose the fictitious character of the transaction.

But the importance of the amount of the mortgage is this. A mortgage for the whole of the amount of the purchase money from a bank without any margin is a somewhat unusual transaction and tends to corroborate defendants' statement that they were the real purchaser. The question of possession and collection of the rents after the sale is one on which there is little evidence. Mr. Houtsma in his cross-examination-in-chief said "The property is in the possession of the defendants."

The possession of the defendants seems never to have been challenged. Mr. Houtsma's statement was not questioned in cross-examination. In March, 1912, Municipal Notices to abate nuisances, addressed "to the owner" were served on the defendants and in compliance therewith defendants spent $22,110.53 in improving the property.

On 12th July, 1911, Messrs. Donaldson and Burkinshaw wrote to Messrs. Braddell Brothers that, pending completion, it was desired to place Chellappa Pillay in the position to obtain the rents of the properties agreed to be sold and suggesting he should be appointed receiver, enclosed drafts of such an appointment. This draft was approved; but there is no evidence that it was executed or acted upon.

Though this does shew an intention to appoint Chellappa as receiver, such an intention does not seem to me inconsistent with the design to let him pose as purchaser. Mr. Houtsma was unable to explain the matter as he went on leave in June 1911.

The plaintiff one of the executors of Chellappa Pillay produced a document dated 25th January, 1911, signed by Chellappa Pillay by which the latter agreed to take $800 per mensem for certain rents in this property after the property was conveyed to him. He acknowledged the receipt of $100 and added somewhat significantly "If the said lands are not conveyed to me or the said lands are otherwise disposed of the said sum of $100 shall be refunded." It does not appear that this agreement was ever acted upon. It's curious proviso is consistent with Chellappa's being a mere nominee of the bank and to my mind rather suggests some such position.

For the purposes of this case, on the evidence produced, I consider it proved that the defendants were in possession of the property when the action was brought.

"The arrangement was 'said Mr. Houtsma' that he (Chellappa Pillay) should get the conveyance and then sell the property bit by bit and hand the bank the receipts and that he should mortgage the property to secure the whole sum owed by S.N.A., viz: $223,000. In examination-in-chief, he said the deposit of $33,500 was paid by a cheque drawn by Chellappa Pillay on our bank, and debited to a special account. Chellappa Pillay had already an account in the bank. *It was never intended that Chellappa Pillay should pay that account.* He never did pay anything to that account."

The arrangments between Chellappa Pillay and the defendants obviously involved a long series of fictitious transactions; the sale and purchase; the conveyance and mortgage the payment with a cheque drawn on the bank; the opening of a special and nominal account between the bank and Chellappa.

Chellappa posing as purchaser with a secret agreement to be the bank's agent had to be provided with apparent funds for his nominal purchase. So the special account No. 2 was opened. The opening of such account is not inconsistent with his being a nominal purchaser. The account being opened the bank in accordance

with its usual routine wrote up interest against it. This is said to be inconsistent with Chellapa's being a nominal purchaser. To my mind there is no inconsistency. The bank no longer charging interest against the sub-mortgagor would naturally charge some interest against the amount nominally lent with a view to getting the eventual profit and loss account on the whole transaction. The entries were mere book entries; but still important for working out the profit and loss and they appear to me part and parcel of the plan.

But after the 31st August, 1912, no more interest was charged. Entries of interest on outstanding accounts were made every two months. Chellappa died on 23rd May, 1912. Why were no entries of interest made on the 31st October, 1912? For the plaintiff it is argued that the ceasing to charge interest marks a change of front by Mr. Houtsma. It is argued that at the interview before Mr. Millard there were mere negotiations to the effect that Chellappa Pillay should be agent for the bank. But after the death of Chellappa Pillay, Mr. Houtsma determined to take advantage of the interview before Mr. Millard and repudiating a real sale to Chellappa claimed that the property had been bought in for the bank. But this view of the facts is to my mind contrary to the evidence, oral and documentary.

There was a suit pending by representatives of one partner of S.N.A. against the bank claiming a declaration of the invalidity of the sub-mortgage.

From the letter Ex. E4 dated 23rd December, 1912, it appears that there were arbitration proceedings in respect of matters in dispute between defendants and S.N.A., in the course of which it was arranged that S.N.A. should assign defendants the equity of redemption in the sub-mortgage. Mr. Houtsma stated that the matter of the settlement was going on from September, 1912. It may be that it was on account of this expected arrangement that no further interest was charged.

But the matter must also be looked at from the point of view of Chellappa Pillay's account books. The first entry relating to the subject was made in the Day Book on 8th September, 1911, nearly eight months after the sale.

"Accounts relating to *Cheque No. 2*" is the translation presented to the Court of Appeal. But counsel for the plaintiffs—respondent suggested the real meaning was probably "relating to *Account No. 2*."

This must be so, because the cheque given was numbered 80 and is so referred to in the account. The account shows cross entries for the $33,500 which it is admitted was never paid to the bank and was merely an overdraft.

It is argued that a chetty money-lender would never make an entry in his books shewing anything but a genuine transaction. Though I am ready to agree that Chetties compare favourably with the money-lenders of Europe; a long experience of chetties does not lead me to endorse this proposition.

What does seem to me to be of great significance is the non-entry of the transaction and of the payment of the $33,500 at the time when the cheque was handed to the auctioneer. Why was the entry delayed more than eight months? Firstly this clearly shows it was *not an ordinary* purchase of land. Secondly it strongly to my mind corroborates defendants' account that Chellappa Pillay was a nominee purchaser.

Mr. Houtsma had left Singapore in June. The putting through of the conveyance was indefinitely postponed. The bank had entries showing a formal overdraft against Chellappa Pillay and he was nominally purchaser. Chellappa Pillay felt it was time to have some entries in his books to correspond.

I will now endeavour to narrate the remaining facts of importance excepting only a few that relate solely to the issue of fraud with which I will deal later.

Mr. Millard left Singapore on the 23rd March 1911 and his department of Messrs. Donaldson and Burkinshaw's business (conveyancing) was taken over by Mr. G. S. Carver who was not then a partner in the firm.

It seems from Mr. Houtsma's letter of 16th May 1911 Ex. E16 that on the 2nd May he had verbally instructed Messrs. Donaldson & Burkinshaw (presumably Mr. G. S. Carver) to seize certain properties in execution of the balance due to defendants on the judgment against S.N.A. He would also appear to have consulted Mr. G. S. Carver as to his rights under the judgment. Mr. G. S. Carver replied at some length in a letter dated 13th May, Ex. E17. He was at that time unaware (as he stated in evidence) that the sale under the mortgage was fictitious and his letter seems to me to indicate that he had a very slight acquaintance with the defendants' affairs because he explained at considerable length that the defendants cannot recover on the full amount of the judgment and also in addition on the covenants in the mortgage given to secure it.

It has not been suggested that Mr. Houtsma really wanted to recover this sum twice over and I think the letter must have been written under a misunderstanding.

Mr. G. S. Carver finally advised that the defendants could recover the balance on the judgment giving credit for the amount realised at the auction. Mr. Houtsma on the 16th May (Ex. E18) sent him his account against S.N.A. allowing $134,000 for the proceeds of sale, less certain expenses and showing a balance due of $101,323.28.

It may well be that Mr. Houtsma thought Mr. G. S. Carver had been informed by Mr. Millard of all the important particulars regarding his affairs.

On the 24th May, 1911, Meyappa Chitty administrator of one of the partners of the firm of S.N.A. issued a writ to set aside the judgment obtained by the defendants against the firm of S.N.A. and claiming cancellation of the sub-mortgage given by Jayamkondan Chetty to defendants; and on the 30th May his solicitors Messrs. Sisson & Delay wrote to Messrs. Donaldson and Burkinshaw objecting to the attachment of the property under the said judgment. The latter replied pointing out that pending the decision of the action of the attachment was unimportant.

The Statement of Claim in Meyappa Chitty's action against the defendants was filed on the 14th November, 1911. It was produced at the trial and a copy has been supplied to the Court of Appeal. Its importance lies in the fact that whilst disputing the validity of the sub-mortgage at any rate as regards the share of the assets of S.N.A. belonging to the deceased partner it appears to recognise the sale under the mortgage as a genuine one shewing that the plaintiff had no idea that the sale was otherwise than real.

In June, 1911, Mr. Houtsma went on leave and there is nothing to show when he returned. In June, 1911, by letters Ex. E15 and E16 dated 14th and 17th June, 1911, Messrs Braddell Brothers and Messrs. Donaldson & Burkinshaw agree to suspend completion of the sale under the mortgage pending the result of the action brought by Meyappa Chetty.

On the 8th September, 1911, Chellappa Pillay for the first time made entries relating to this transaction in his books.

In January, 1912, he returned to India and died on 23rd May, 1912.

One day before his death Chellappa Pillay made his will. He referred in detail to his Indian property and mentioned that he had money worth about two lakhs of dollars $200,000 invested on private grants mortgages and demand notes in connection with his business in Singapore. He gave directions for the winding up of a business in Singapore and as regards the conduct of a suit there pending against him; but made no mention of the matter now under consideration.

Whether he was a nominal or beneficial purchaser of this land, the omission seems almost equally strange.

It was not until May, 1913, that Chellappa Pillay's executor arrived in this Colony; he obtained Probate about August, 1913.

On the 10th September, 1913, Messrs. Braddell Brothers on his behalf asked for completion of the sale (Ex. E23) and then ensued a correspondence in which the true position was explained by Messrs. Donaldson & Burkinshaw.

A writ in this matter was issued on 19th November, 1913, the pleadings closing on the 29th April, 1914.

It is clear from the letter Ex. E4 dated 23rd December, 1912, that not long before Chellappa's executor, Meyappa Chetty arrived in this Colony the terms of the settlement between those interested in the S.N.A. firm and the defendants had been arrived at by arbitration. According to Mr. Houtsma's evidence the matter of the settlement went on between September, 1912, and April, 1913, the deed of compromise being dated 11th April, 1913.

Whilst the action of Meyappa Chetty was pending against the defendants, some time in 1913, Messrs. Donaldson & Burkinshaw instructed Sir Evelyn Ellis to settle the defence in the case. These instructions referred to the sale now in question without any suggestion that it was a sale to a nominee or otherwise than a real transaction.

It is argued that the numerous communications from Messrs. Donaldson & Burkinshaw put in evidence are consistent only with a real sale to Chellappa Pillay and that the only proper inference is either that the sale at the time it was made was intended to be a sale to Chellappa Pillay, or that some time subsequently Chellappa Pillay and Mr. Houtsma agreed that what was originally a sham transaction should be treated by them as a reality.

The resulting position is no doubt extraordinary; explainable partly perhaps by the fact that the departments of legal firms in the colony are to some extent sort of "water-tight compartments" the heads of which owing to leave and other reasons are frequently changed.

However that may be, the facts of this case in my opinion are clear beyond all doubt. The letter Ex. E27 dated 7th January, 1914, written by Messrs. Donaldson and Burkinshaw to Messrs. Braddell Brothers setting out the main facts of the matter has been admitted at the Bar by counsel on both sides to have been signed by Mr. Millard. In this letter Mr. Millard reiterates

the position, clearly indicating that to his knowledge it had never been altered. His evidence at the end of 1914 without any cross-examination is conclusive.

As regards the argument that though at the time of auction Chellappa Pillay may have intended to buy for and on behalf of the bank without any "animus contrahendi" for himself but that subsequently it was agreed between him and Mr. Houtsma that Chellappa Pillay should turn his sham buying into a real purchase, that would be a new contract distinct from that entered into on the 12th January, 1911, on which this action is brought and could not now be set up.

In my opinion the evidence whether in writing or otherwise is against such a new contract.

The plaintiff says that the defendants are setting up matters in defence which involve the defendants' own fraud, and urges that the defendants cannot be allowed to give evidence of such matters. They also allege that the fraud is something more than mere illegality. Therefore it is necessary to consider this question of fraud.

Section 239 of the local Civil Procedure Code (adopted from the English Order XIX r. 6) provides that in all cases in which the party pleading relies on fraud, etc., particulars shall be stated in the pleadings. Section 249 (taken from the English Order XIX r. 15) provides that the defendant or plaintiff (as the case may be) must raise by his pleading all matter which shew that the transaction is void or voidable in point of law and all such grounds of defence as if not raised would be likely to take the opposite party by surprise or would raise issues of fact not arising from the preceding pleadings as for instance fraud, etc., or illegality.

Now in defence to the plaintiff's plea of agreement to sell, the defendants, in effect, set up the plea that Chellappa Pillay agreed to buy as agent of the vendor mortgagees and to take a conveyance of the property as trustee of the defendants and give a mortgage on the same to the defendants.

To this the plaintiff replied that these agreements were illegal and void and the provisions of the Statute of Frauds were not complied with.

I understand this to mean that the plaintiff asserted the illegality of a sale by a mortgage to his nominee or agent under any circumstances coupled with an assertion as to its nullity.

There are certainly no particulars of the illegality and the plea (I conceive) can only refer to the facts set out in the previous pleading. If any other illegality or fraud were set up by the plaintiff particulars were necessary to prevent the defendants being taken by surprise.

In the course of the hearing of this appeal I understood Sir Evelyn Ellis counsel for the plaintiff respondent to state that though they suspected fraud as distinguished from illegality they had not sufficient knowledge thereof to plead it. And that they only had the knowledge of fraud after the cross-examination of Mr. Houtsma. But accordingly to the notes of the learned trial Judge Sir Evelyn Ellis in opening referred to 2 Barn. and Add. page 367 (*Doe Dem Roberts* v. *Roberts*) which has now been quoted as an authority for the proposition that no man can allege his own fraud to invalidate his own deed.

Can the plaintiff now set up a fraud of which they gave no particulars and in respect to which he obtained no leave to amend his pleadings? That is a matter on which I have some considerable doubt. The plaintiff had knowledge (as appears from the document put to Mr. Houtsma in cross-examination) of nearly all the facts except a few statements extracted from Mr. Houtsma in cross-examination.

The plaintiff knew from Mr. Millard's evidence (given nearly a month before the trial) that Mr. Houtsma was from the beginning aware that a mortgagee could not purchase the property subject to the mortgage and that any such purchase was liable to be set aside by those interested in the equity of redemption. Presumably he also knew (through discovery) of Mr. Carver's letter stating to Mr. Houtsma that the transaction was one which Mr. Millard had advised was not legal. He was aware that Mr. Houtsma had carried out the transaction and that Meyappa Chetty (a representative of S.N.A.) had been kept for many months uninformed of the real nature of the sale. He now puts forward this Statement of Claim as evidence of S.N.A.'s ignorance. He knew that if defendants' story was true there had been a long course of deception. He knew that S.N.A.'s property had been attached in execution of the original judgment. Yet all this did not to his mind justify an explicit charge of fraud with full particulars.

In some cases of course the court must itself take notice of a fraud even though it has not been pleaded. Is this one of those cases? What is the additional evidence on which the plaintiffs now base this charge of fraud? The plaintiff does not suggest that the property was sold at an undervalue.

The alleged incriminatory admissions are the following statements of Mr. Houtsma:—

> "Our object was to cut off the first mortgagee but we did not want him to think there had been a genuine sale. Another object was to get rid of all litigation with the partner in S.N.A. those being our mortgagors. We thought about getting an independent title of our own to the property. The sale of the property would have reduced our claim. The litigation with S.N.A. was going on at the time of the sale and one of the partners of S.N.A. was claiming against the bank. On the 7th November, 1910, I was asked by S.N.A. (Jayamkondan Chetty) not to seek to enforce our sale by mortgage. I wished it at that moment to be considered a genuine sale as against S.N.A. I wished them to believe it a genuine sale, although I know it was nothing of the kind. Later on, far later on, I informed S.N.A. it was not a genuine sale. That was after we came to terms. That was between September, 1912, and April, 1913."

The person here referred to as the partner of S.N.A. is Meyappa Chitty one of the executors of the deceased partner. This evidence is not quite accurate. Mr. Houtsma evidently forgot that at the time of the sale defendants had no litigation with S.N.A. or Meyappa Chetty.

During the sale Mr. Millard gave Mr. Houtsma what was (as it seems to me) the first intimation of the claim of Meyappa Chetty; but this claim was not brought by Meyappa Chetty into Court till the following May.

At the time Mr. Houtsma decided on the scheme for buying in the land, it would appear that it was not litigation with this partner of S.N.A. that influenced him. Mr. Houtsma's object was to get in the money due to the defendants from S.N.A. As in the case of *Henderson* v. *Astwood*, 1894, A.C. 150, there was little chance of the property realising the sum secured by the mortgage. He thought his best prospect of reducing the ultimate loss on the transaction was for the defendants to acquire the property hoping for a rise in value and having it in his mind to sell it in small parcels.

He had certainly reason to expect that he would recover some part of the balance left on the judgment debt. This I think is evidenced by his attachment in June of S.N.A's. property. But seeing what difficulties beset him in his attempts to recover the debt due to the defendants there was little ground for expecting a recovery of the whole. *Being advised that the remedy of foreclosure was not open* to the defendants he obstinately and wrongheadedly determined to attempt the achievement of the same result by a course of deception. He arranged with his confidential adviser Chellappa Pillay that the latter should act as his nominee in purchasing the property and that he should ultimately pose as beneficial owner before the world. Chellappa joined in this scheme so thoroughly that he even deceived his own solicitors as to his position; and he never undeceived them.

In considering what grounds Mr. Houtsma had for thinking the whole debt irrecoverable from S.N.A. one must take into account what was actually recovered. The judgment of the 4th February, 1910, against S.N.A. was for $224,523 which with interest at 8 per cent per annum would at the time this action was brought amount to about $290,000. The defendants on the settlement with S.N.A. obtained something less than $35,000 and S.N.A's. rights in this property. Putting the appreciated value of this property at the highest possible price that alleged by the plaintiffs in their claim for damages viz $235,000- one sees that the defendants have actually never recovered the amount of the overdraft due from S.N.A. and in fact are at least $20,000 out of pocket.

But what are facts elicited by this cross-examination of which the plaintiffs allege they had no substantial notice before trial? As I understand it there are three (i) That defendants wanted to cut out the first mortgagee (by whom it is admitted was meant S.N.A. as represented at first by Jayamkondan and subsequently by Meyappa Chetty, (ii). The concealment of the true facts of the sale from S.N.A. until terms of a settlement had been reached (iii) That the evidence disclosed an intention to oppress S.N.A. and to use this ostensible sale as a lever to extort better terms than could otherwise be obtained.

The law as to the position of a mortgagee who in exercise of a power of sale buys in himself or through an agent is laid down in *Farrars* v. *Farrars*, (L.R. 40 Ch.D. 395).

A sale by a mortgagee to himself or his agent is no sale at all; it is no exercise of the power which does not authorise him to take the property subject to it at a price fixed by himself. Even though such a price be the full value a mortgagee can only sell to himself when the sale is made by the Court and he has previously obtained leave to bid. A sale to a trustee only gets over the difficulty so far as form is concerned, but is not necessarily fraudulent if it is not impeached for undervalue and was honest and without sinister purposes.

The matter was considered in greater detail by Their Lordships of the Privy Council in the case of *Henderson* v. *Astwood*, (1894 A.C. 150); a case which somewhat resembles the present case though there are also many impor-

tant differences. In that case Their Lordships were satisfied that neither the mortgagor nor mortgagee considered the equity of redemption worth thinking about. The mortgagor would not pay the interest and had no money. On the mortgagor's part there was no oppression. The test laid down by Their Lordships seems to have been "was it done with dishonest intent?"

The present case is more complicated because the submortgage was given as security for a judgment debt and there was a prospect of realising to some extent on that judgment debt for the deficiency left by the sale of the mortgaged property.

The desire "to cut out" the sub-mortgagor to which Mr. Houtsma admitted does not seem to me fraudulent in view of the facts that the sale was a public one and that the fairness of the purchase price is not impeached.

Though Mr. Houtsma says there was no disclosure till the terms of settlement were arranged; there was disclosure before the settlement was finally made as is evidenced by the Deed of Settlement. If there were grounds for thinking that S.N.A. had been prejudicially dealt with by reason of non-disclosure S.N.A.'s solicitors would have seen that there was ample opportunity for modifying the terms. No evidence has been called to show that Meyappa Chitty or S.N.A. considered they had been oppressed or unfairly dealt with.

Mere "suppressio veri" after a sale by a mortgagee to an agent is not in itself a fraud. This is clear from *Astwood* v. *Henderson* where Their Lordships of the Privy Council state that though Astwood's conduct was reprehensible in not informing the mortgagor of the true position of affairs when once he was clearly aware that the transaction was a nullity; still his conduct did not amount to actual fraud. Mr. Houtsma of course was in a different position because he clearly understood from the beginning that he was carrying out a transaction that had no legal validity and in spite of that understanding put it through with an elaborate machinery of deception. But if his intentions and motives were not dishonest or oppressive I doubt whether this was actual fraud.

Taking the whole of the facts into consideration and particularly the impossibility of legal foreclosure I do not think that Mr. Houtsma's concealment of the true nature of this sale was intended to cause loss to S.N.A. or any profits to the defendants beyond the recovery of what was due to them; or that it was done at the commencement with an intent to oppress S.N.A. Therefore taking "actual dishonest intent" as the test of fraud I do not find him guilty of fraud.

Far more emphatically am I of opinion that if any fraud was intended the fraudulent purpose was not accomplished.

How does Chellappa stand as regards fraud? He obviously knew S.N.A. were to be deceived and did his best to help in the deception even to the extent of deceiving his own solicitors. If mere deception is fraud in such a case then he is involved in it; he is *in pari delicto*; does not come into court with clean hands and therefore cannot recover.

This being my opinion with regard to the facts of the alleged actual fraud I will now assume that may view is wrong and consider the defendants' position on the supposition that Mr. Houtsma before or at the time of the agreement with Chellappa Pillay had an intention to defraud or oppress.

The agreement in respect of which specific performance is asked was still "executory" in the sense that the contract had not been completed. There was only an agreement to assign property and no actual legal transfer.

The plaintiffs rely on the cases of *Doe Dem Roberts* v. *Roberts*, (2 B. & Ald. 367) and *Baldwin* v. *Gawthorne* (19 Vesey Junr. 166) in support of their contention that defendants cannot set up a story involving his own fraud. But in both these cases the legal ownership of the property had been actually transferred by deed to the other party. The defendants on the other hand refer to the cases of *Bowes* v. *Forster*, 2 Hurl. and Norm. 779 and *Taylor* v. *Bowers*, L.R. 1 Q.B.D. 291. In the former case there was a pretended sale of goods coupled with the delivery of possession: the object being to prevent execution by creditors. It was held that there having been no deed the vendor was not precluded from showing that this was sham transaction and a nullity.

This case was followed in *Taylor* v. *Bowers* where there was an assignment of a chattel in fraud of creditors and repudiation of the assignment whilst the purpose of the transfer was still unaccomplished. Though no compromise with the creditors was effected yet two meetings of the creditors were held and it seems that there was an offer of a dividend of one shilling in the pound. There was also actual delivery of the goods to the nominal purchaser.

But the whole law on the subject is plainly summed up in a decision of Their Lordships of the Privy Council in *Pethaperumal Chetty* v. *Munimandi Servai*, XXIV L.T.R. 462; a case not referred to by counsel.

In that case there was an actual conveyance of lands to a nominee purchaser for a fraudulent object; and yet the plaintiff was allowed to recover the property on evidence given of the unreality of the ostensible sale and transfer.

The main question of appeal to the Privy Council was "Is the plaintiff despite his participation in the fraudulent attempt to defeat his creditor entitled to recover the posession of the lands purported to be conveyed. Their Lordships quote with approval from *Mayne's* Hindu Law the following passage "The fact that "A" has assumed the name of "B" in order to cheat "X" can be no reason whatever why a court should assist or permit "B" to cheat "A." But if "A" requires the help of the Court to get the estate back into his own possession or to get the title into his own hands it may be very material to consider whether "A" has actually cheated "X" or not. If he has done so by means of his "alias," then it has ceased to be a mere mark and has become a reality. It may be proper for a court to say that it will not allow him to resume the individuality which he has once cast off in order to defraud others. If however he has not defrauded anyone, there can be no reason why the court should punish his intention by giving his estate away to "B" whose roguery is even more complicated than his own."

Their Lordships held that when property is transferred to a confederate in order to effect a fraud, steps taken towards the accomplishment of the illegal object do not preclude the fraudulent grantor or giver from asserting his rights in a Court of Justice, and that it is only when the fraudulent purpose has been effected (in part or in whole) that he is thus debarred. The facts in this Indian Case appear to me to have a strong resemblance to those now under consideration. There was an actual conveyance, not merely a contract to convey; a previous suit had been contested against the person to be defrauded on the basis that the sham conveyance was a real one; and subsequently the land was mortgaged on such basis. Efforts to carry out the fraud had gone much farther than the present case.

The present defendants in setting up the unreality of the sale are not carrying out the illegal transaction but are seeking to put every one as far as possible in the same position as they were before the transaction was determined upon. Supposing that the defendants had not bought the equity of the redemption, is it conceivable that the court could order performance of the sale of rights vested in the sub-mortgagor. I fail to see why plaintiff's position should be improved because the sub-mortgagee seeing the error of his ways and having confessed his faults thereafter bought the mortgagor's rights. I am therefore of the opinion that the defendants are not debarred from giving evidence of the true facts of the matter. It has been ably and ingeniously argued that section 92 of the Evidence Ordinance precludes oral evidence showing the contract of sale to be other than what it purports to be. *This section* read together with section 91 provides that when *the terms* of *a contract* have been reduced to writing, no evidence of any agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting varying adding to or substracting *from its terms.*

In order that the section may apply one must have a contract and then its operation *prima facie* only affects the terms. Read together with its provisoes, in a jurisdiction like this where English Common Law and Equity prevail, I doubt whether it has any more effect than the corresponding rule of the English Law of Evidence enunciated in very similar terms in article 90 of Stephen's Digest of the Law of Evidence.

The case of *Balkishen Das* v. *Legge*, I.L.R. 22 All. 149 has been referred to in which their Lordships of the Privy Council deal with the corresponding section of the Indian Evidence Act and state that cases in the English Court of Equity such as *Rochefoucauld* v. *Boustead*, having no application to the Law of India as laid down in the Acts of the Indian Legislature. It does not necessarily follow that such cases have no application in this Colony.

I do not find it necessary to express a definite opinion on this point; because in my view section 92 can only apply where a contract was intended by at least one of two parties; and has no application where neither of two ostensible parties had any "animus contrahendi." In the present case the transaction reduced to writing was not a contract and was never intended by either of the two ostensible parties to be a contract binding as between two real parties of separate and opposing interest; they both took part in this sham transaction knowing that the two names used represented the same party.

If one assumes that the document should be regarded *prima facie* as a contract, still proviso I would apply; according to which "any fact may be proved which *would invalidate any document* or which would *entitle any person* to any decree or order relating thereto; such as fraud, intimidation, illegaility, want of due execution, want of capacity in any contracting party or failure of consideration or mistake in fact or law,

Where the document is a contract, want of two parties is an invalidating fact. Such a sale as is proved by the evidence was a " fraud on the power " which would entitle some persons, the sub-mortgagor (and apparently the original mortgagor) to an order setting aside the sale. An agent for the sub-mortgagee had no capacity to contract with the mortgagee. Numerous Indian Cases have been referred to. They show that in India a person who purports in writing to assign absolutely cannot bring mere oral evidence to vary the terms of what was admittedly intended to be a contract or some sort, between the parties and thereby prove that the real intention was a mortgage.

If the plaintiff's contention is correct as regards section 92 there is an indisputably honest agreement for sale by a mortgagee to a nominee, as in *Astwood* v. *Henderson*. if the nominee turned on his principal and demanded specific performance, the latter though, desirous of performing his duty could not show the true nature of the transaction.

At the commencement of this branch of the argument, it was stated that cases dealing with what in India are styled " Benami matters " did not apply, because such transactions are peculiar to India. So far as I can understand the phrase " *benami* " it applies to all purchases of property in the name of another, and to all transactions in a name other than that of the real transactor, be they honest or be they dishonest. They cover a large area than the English " Trust " but the central idea is the same.

Although for honest purposes more common in India than in most countries such transactions are coextensive with human ingenuity and law. In England the Statute of Uses and the Statute of Frauds were enacted to check such " subtle inventions."

It was suggested that in India, for some reason or other, the *benami* transactions are treated in a peculiar way as regards section 92. But this section must have as much application to sham transactions as to other matters.

In none of the Indian cases relating to sham transaction including *Pethaperumal Chetty's* case, that I have perused has any mention been made of section 92. I think the reason is that this section has no application where from the beginning there was no intention by either of the nominal parties to form a contract; a relationship which essentially requires two parties and is not satisfied by two names.

For these reasons I am of opinion that the appeal should be allowed and judgment entered for the defendants.

Appeal allowed.

Solicitors for the Plaintiff (respondent)— *Braddell Brothers.*

Solicitors for the Defendants (appellants)— *Rodyk & Davidson.*

THE END OF THE STRAITS SETTLEMENTS OFFICIAL REPORTS.